Sunlite Textile Sdn Bhd v Motilal Realty Sdn Bhd (Part 2)

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S 6–24–1015 OF 2006
ABDUL MALIK ISHAK J
10 MAY 2007

Civil Procedure — Stay of execution of judgment — Application for — Notice of appeal filed — Fresh evidence had emerged — Evidence not in existence at the time of hearing — Whether defendant entitled to rely on fresh evidence to support its application for stay — Whether doctrine of res judicata applied

Evidence — Fresh or further evidence — Principles applied — Whether defendant entitled to rely on fresh evidence to support its application for stay

The plaintiff as the purchaser and the defendant as the vendor entered into a sale and purchase agreement dated 22 March 2002 in respect of a property. The plaintiff paid the full purchase price of RM4,995,000 on 15 December 2002. The plaintiff claimed that when vacant possession of the property was delivered by the defendant on 1 May 2003 its condition was not the same as on the date of execution of the sale and purchase agreement. The plaintiff's claim in encl 1 for the sum of RM394,000 as special damages for repair works and general damages to be assessed for loss of rentals for three and a half months was granted and the balance of the plaintiff's claim was fixed for assessment of damages before the learned senior assistant registrar (collectively 'the said order'). Subsequently the plaintiff had also filed a petition to wind up the defendant on the basis of the above order and the same is now fixed for hearing on 16 February 2007. That winding-up petition had since been postponed on a number of occasions because of the continuing oral submissions of this application for stay. In the meantime, the defendant had filed a notice of appeal against the said order which is still pending before the Court of Appeal. The defendant in encl 26 now sought for a stay of execution. It was argued that the special circumstances warranted a stay of execution of the said order had surfaced. New evidence had emerged and that would render it inequitable and unjust that the said order should be carried into effect. During the hearing of the assessment of damages before the learned senior assistant registrar, the plaintiff disclosed and introduced two new exhibits, namely reports and valuations dated 2 May 2003 and 25 October 2004 respectively in respect of the subject property and both the reports stated that it was the plaintiff's financier and/or the plaintiff who had commissioned the reports to be prepared. The learned counsel for the defendant argued that in the context of encl 1, the plaintiff's claim for special damages for the sum of RM394,000 for the purported 'repair works' to 'reinstate' the property to its original condition as at the date of execution of the sale and purchase agreement dated 22 March 2002 is untenable and, in fact, a false claim and constitutes an unjust enrichment at the defendant's expense. It was further submitted that if the plaintiff had disclosed to this

court, as it was bound to do so, in regard to both the reports, this court would not have granted the plaintiff the special damages as claimed by the plaintiff.

Held:

(1) Both the reports may be regarded as fresh evidence that was not introduced when the plaintiff advanced its application for the said order (see the conditions set out in *Ladd v Marshall* [1954] 3 All ER 745). Firstly, both the reports were the plaintiff's documents and they had been commissioned by the plaintiff's financier and/or by the plaintiff and they were, at all material times, in the possession of the plaintiff. It was the plaintiff who for the very first time disclosed both the reports during the hearing of the assessment of damages before the learned senior assistant registrar on 29 November 2006 and that was after the said order was granted. Secondly, the fresh evidence was relevant and it would have an important influence in regard to the outcome of the case because as both the reports showed that the plaintiff did renovation and upgrading works and not merely repair works as alleged in order to re-instate the property to its original condition as at the date of the sale and purchase agreement. Thirdly, the fresh evidence was also credible because they were written documents prepared by professionals and tendered in court by the plaintiff itself in support of its claim for an assessment of damages (see para 17).

(2) The plaintiff did not disclose and/or omitted to disclose a crucial page in the sale and purchase agreement. That would be page 24 and in that page a material clause Part 12 relating to the date of delivery of possession. Part 12 read together with clauses 6 and 10 of the sale and purchase agreement would reveal that the date of delivery of possession of the property was on 15 December 2002 and the plaintiff averred that vacant possession was delivered on 1 May 2003. Pursuant to cl 10 of the sale and purchase agreement, the defendant would only be liable if on the date of delivery of possession, that is, on 15 December 2002, the property was not in the same condition as on the date of execution of the sale and purchase agreement on 22 March 2002. In fact, there was no such averment or allegation by the plaintiff and therefore liability could not be attached to the defendant. The plaintiff's allegations that when vacant possession was delivered on 1 May 2003, the property was not substantially in the same condition as on the date of the sale and purchase agreement was certainly irrelevant (see paras 27 & 30).

(3) In considering the stay application, the absence of an affidavit in reply by the defendant to challenge encl 1 and to rebut the affidavit in support in encl 2 would not and could not dispense with the legal requirement of proving the damages by the plaintiff to the hilt. But, it must also be borne in mind, that in considering encl 1, all the averments in the affidavit in support in encl 2 stood alone, unrebutted and deemed to be admitted (see para 36).

(4) On the available evidence, in adjudicating the stay application the doctrine of res judicata had no application. Public policy considerations dictate that the doctrine do not apply because it is a separate application pending the appeal to the Court of Appeal. It would be perverse to argue that the stay application

had been decided by this court in the first judgment. Here, if the stay was not granted, the appeal, if successful, would be rendered nugatory. It must be emphasised that the defendant's contention of the presence of the fresh evidence in the form of both the reports could not be ignored. This fresh evidence constituted special circumstances (see para 45).

[Bahasa Malaysia summary

Plaintif sebagai pembeli dan defendan sebagai penjual telah memasuki satu perjanjian jual beli bertarikh 22 Mac 2002 berhubungan dengan satu hartanah. Plaintif telah membayar penuh harga belian sebanyak RM4,995,000 pada 15 Disember 2002. Plaintif menyatakan ketika milikan kosong hartanah tersebut diberikan kepada defendan pada 1 Mei 2003 keadaannya adalah tidak sama dengan pada masa perjanjian jual beli ditandatangani. Tuntutan plaintif di kandungan 1 untuk jumlah RM394,000 sebagai ganti rugi khas untuk kerja-kerja pembaikan dan ganti rugi am untuk ditaksirkan untuk kehilangan sewa selama tiga setengah bulan diberikan dan baki tuntutan plaintif telah ditetapkan untuk taksiran ganti rugi di hadapan penolong kanan pendaftar (secara kolektif 'perintah tersebut'). Kemudiannya plaintif juga telah memfailkan satu petisyen menggulungkan defendan atas dasar perintah tersebut dan ini telah ditetapkan untuk pendengaran pada 16 Februari 2007. Petisyen penggulungan telah semenjak itu ditangguhkan beberapa kali disebabkan oleh hujahan bersambung permohonan untuk penggantungan ini. Sementara itu, defendan telah memfailkan satu notis rayuan terhadap perintah tersebut yang masih belum didengar di Mahkamah Rayuan. Defendan melalui lampiran 26 sekarang memohon untuk penggantungan perlaksanaan. Ia dihujahkan bahawa telah berbangkit keadaan-keadaan khas yang mewajarkan penggantungan perlaksanaan perintah tersebut. Bukti baru telah berbangkit dan ini dapat menyebabkan ia tidak saksama dan tidak adil untuk perintah tersebut dilaksanakan. Semasa pendengaran untuk mentaksirkan ganti rugi di hadapan penolong kanan pendaftar, plaintif telah mengemukakan dua ekshibit yang baru, iaitu laporan dan penilaian bertarikh 2 Mei 2003 dan 25 Oktober 2004 masing-masing berhubungan dengan hartanah tersebut dan kedua-dua laporan menyatakan bahawa pembiaya plaintif dan/atau plaintif telah menugaskan kedua-dua laporan tersebut untuk disediakan. Peguamcara bijaksana defendan berhujah bahawa di dalam konteks lampiran 1, tuntutan plaintif adalah untuk ganti rugi khas untuk jumlah RM394,000 kononnya untuk 'kerja-kerja pembaikan' untuk 'mengembalikan semula' hartanah tersebut dalam keadaan asalnya seperti pada tarikh perjanjian jual beli bertarikh 22 Mac 2002 ditandatangani adalah tidak dapat diterima dan, sebenarnya, satu tuntutan palsu dan ini membentuk satu pengayaan yang tidak adil terhadap defendan. Ia juga dihujahkan bahawa sekiranya plaintif telah mengemukakan kepada mahkamah ini, seperti yang sepatutnya, berhubungan dengan kedua-dua laporan tersebut, mahkamah ini tidak akan memberikan plaintif ganti rugi khas seperti yang dituntut oleh plaintif.

Diputuskan:

(1) Kedua-dua laporan boleh dianggap sebagai keterangan baru yang tidak dikemukakan apabila plaintif membuat permohonannya untuk perintah tersebut (lihat syarat-syarat yang dinyatakan dalam *Ladd v Marshall* [1954] 3

All ER 745). Pertamanya, kedua-dua laporan adalah dokumen-dokumen plaintif dan mereka telah ditugaskan oleh pembiaya plaintif dan/atau plaintif dan laporan-laporan tersebut, pada kesemua masa yang material, berada di dalam milikan plaintif. Ia adalah plaintif yang pertama kali mengemukakan kedua-dua laporan tersebut ketika pendengaran taksiran ganti rugi di hadapan penolong kanan pendaftar yang bijaksana pada 29 November 2006 dan selepas perintah tersebut diberikan. Keduanya, keterangan baru adalah relevan dan ia akan mempunyai pengaruh penting berhubungan dengan hasil kes tersebut oleh kerana kedua-dua laporan menunjukkan bahawa plaintif telah menjalankan kerja-kerja ubahsuai dan peningkatan dan bukan hanya kerja-kerja pembaikan seperti yang dinyatakan di dalam perintah untuk mengembalikan semula hartanah tersebut kepada keadaan asalnya pada tarikh perjanjian jual beli tersebut. Ketiga, keterangan baru juga boleh dipercayai oleh kerana mereka adalah dokumen-dokumen bertulis yang disediakan oleh pakar-pakar dan dikemukakan ke mahkamah oleh plaintif sendiri untuk menyokong tuntutannya untuk taksiran ganti rugi (lihat perenggan 17).

(2) Plaintif tidak mendedahkan dan/atau gagal mendedahkan satu mukasurat yang penting di dalam perjanjian jual beli tersebut. Ia adalah mukasurat 24 dan di mukasurat tersebut satu klausa material Bahagian 12 yang berkaitan dengan tarikh penyerahan milikan kosong. Bahagian 12 dibaca bersama kl 6 dan 10 perjanjian jual beli akan mendedahkan tarikh penyerahan milikan hartanah tersebut adalah pada 15 Disember 2002 dan plaintif menyatakan bahawa milikan kosong diserahkan pada 1 Mei 2003. Mengikut kl 10 perjanjian jual beli, defendan hanya bertanggungjawab sekiranya pada tarikh penyerahan milikan, iaitu, pada 15 Disember 2002, hartanah tersebut tidak di dalam keadaan yang sama seperti pada tarikh perjanjian jual beli ditandatangani pada 22 Mac 2002. Sebenarnya, tiada penegasan atau pengataan oleh plaintif dan dengan itu liabiliti tidak boleh dikaitkan dengan defendan. Pengataan plaintif bahawa milikan kosong diserahkan pada 1 Mei 2003, hartanah tersebut tidak berada di dalam keadaan yang sama seperti pada tarikh perjanjian jual beli adalah tidak relevan (lihat perenggan 27 & 30).

(3) Dalam menimbang permohonan penggantungan, ketiadaan afidavit jawapan oleh defendan untuk mempertikaikan lampiran 1 dan juga mematahkan afidavit sokongan di lampiran 2 tidak akan dan tidak boleh mengetepikan dengan keperluan undang-undang untuk membuktikan kerugian oleh plaintif dengan sepenuhnya. Akan tetapi, ia harus diingati juga, dalam menimbang lampiran 1, segala penegasan di dalam afidavit sokongan di lampiran 2 berdiri dengan sendirinya, tanpa dipatahkan dan dianggap diakui (lihat perenggan 36).

(4) Berdasarkan bukti yang ada, dalam mengadili permohonan penggantungan doktrin res judicata tidak terpakai. Pertimbangan polisi awam memerlukan supaya doktrin tersebut tidak terpakai oleh kerana ia adalah permohonan berlainan sementara menunggu rayuan ke Mahkamah Rayuan. Ia adalah berlawanan untuk berhujah bahawa permohonan penggantungan tersebut telahpun diputuskan oleh mahkamah ini di penghakiman pertama. Di sini, sekiranya penggantungan tidak diberikan, rayuan sekiranya berjaya akan menjadi tidak berguna. Ia mesti ditekankan bahawa penegasan defendan akan

kehadiran keterangan baru ini dalam bentuk laporan-laporan tersebut tidak boleh diketepikan. Keterangan baru ini membentuk keadaan khas (lihat perenggan 45).]

Notes

For cases on application for stay of execution of judgment, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6423–6469.

For cases on principles applied on fresh or further evidence, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1570–1571.

Cases referred to

AG v Rochester Corpn [1833] 6 Sim 273 (refd)

Alfred Rowntree & Sons Ltd v Frederick Allen & Sons (Poplar) Ltd (1935) 41 Com Cas 90 (refd)

Badar Bee v Habib Merican Noordin [1909] AC 615 (refd)

Charm Maritime Inc v Minas Xenophon Kyriakou and David John Mathias [1987] 1 Lloyd's Rep 433 (refd)

Che Wan Development Sdn Bhd v Co-operative Central Bank Bhd [1989] 3 MLJ 40 (refd)

Chong Woo Yit v Government of Malaysia [1989] 1 MLJ 473 (refd)

Collier v Walters [1873] LR 17 Eq 252 (refd)

Credit Lyonnais v SK Global Hong Kong Limited [2003] MLB (HK) 28311 (refd)

Danks v Farley [1853] 1 WR 291 (refd)

DSV Silo-und Verwaltungsgesellschaft mbtt v Owners of the Sennar, The Sennar [1985] 2 All ER 104; [1985] 1 WLR 490 (refd)

Eastmure v Laws (1839) 5 Bing NC 444 (refd)

Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] AC 32 (refd)

Glasgow and South-Western Rly Co v Boyd and Forrest [1918] SC (HL) 14 (refd)

Government of Malaysia v Dato Chong Kok Lim [1973] 2 MLJ 74 (refd)

Graydon, Re; ex p Official Receiver [1896] 1 QB 417 (refd)

Green v Weatherill [1929] 2 Ch 213 (refd)

Hager v Osborne [1992] Fam 94, [1992] 2 All ER 494 (refd)

Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57 (refd)

Hills v Co-operative Wholesale Society Ltd [1940] 2 KB 435; [1940] 3 All ER 233 (refd)

Ho Kok Thin & Anor v KMA Marketing Sdn Bhd [2006] 7 MLJ 152 (refd)

Hongkong Bank Malaysia Bhd v Wexcel Holdings Sdn Bhd & Ors [2005] 2 MLJ 616 (refd)

Hoystead v Taxation Comr [1926] AC 155 (refd)

Jaya Harta Realty Sdn Bhd v Koperasi Kemajuan Pekerja-Pekerja Ladang Bhd [2000] 6 MLJ 493 (refd)

Johore State Economic Development Corp v Queen Bee Sdn Bhd [1995] 4 MLJ 371 (refd)

Kerajaan Malaysia v Jasanusa Sdn Bhd [1995] 2 MLJ 105 (refd)

Kho Poh Teck v Digi Telecommunications Sdn Bhd [2006] 6 MLJ 349 (refd)

Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257 (refd)

Ladd v Marshall [1954] 3 All ER 745 (folld)

Livesey v Harding [1855) 21 Beav 227 (refd)

Long v Gowlett [1923] 2 Ch 177 (refd)
Mac Dougall v Knight (1890) 25 QBD 1 (refd)
Mahindar Singh v Amanah Saham Pahang Bhd & Anor [1984] 1 CLJ 181 (refd)
Marriot v Hampton (1797) 7 Term Rep 269 (refd)
Matuszczyk v National Coal Board [1955] SLT 101 (refd)
May, R (1885) 28 ChD 516 (refd)
MBF Property Services Sdn Bhd v Madihill Development Sdn Bhd (No 3) [1998] 5 CLJ 461 (refd)
Mc Phail v Persons, Names Unknown [1973] 1 Ch 447 (refd)
Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd [2002] 3 MLJ 49 (refd)
Mohamed Mustafa v Kandasami (No 2) [1979] 2 MLJ 126 (refd)
Philips v Bury [1696] Holt KB 715 (refd)
Pontian United Theatre Sdn Bhd v Southern Finance Bhd (formerly known as United Merchant Finance Bhd) [2006] 2 MLJ 602 (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)
R v Middlesex Justices; ex p Bond [1933] 2 KB 1 (refd)
R v Sunderland Justices; ex p Hodgkinson [1945] KB 502; [1945] 2 ll ER 175 (refd)
Royal Bank of Canada v Rex [1913] AC 283 (refd)
Tam Ho Man v Wong Kwok Tai HCA 004 736 1985 (refd)
Webster v Armstrong (1885) 54 LJQB 236 (refd)
Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal [1993] 2 MLJ 217 (refd)
Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v Raja Zainal Abidin bin Raja Hussin & Anor [1995] 3 MLJ 224 (refd)

Legislation referred to

Contracts Act 1950 s 74
Evidence Act 1950 s 101
Rules of the High Court 1980 O 45 r 11

Ashokvijay J Sanghrajka (TK Wong Tan & Associates) for the plaintiff.
Ramdas Tikamdas (Siva Ram & Associates) for the defendant.

Abdul Malik Ishak J (now JCA):

THE SUMMONS IN CHAMBERS IN ENCL 26

[1] This was the defendant's application and in this enclosure the defendant sought for the following prayers:

(a) that execution on the order dated the 30 August 2006 against the defendant be stayed pending the hearing and disposal of the defendant's appeal to the Court of Appeal;

(b) that all further proceedings pursuant to the said order dated 30 August 2006 and the Originating Summons No S 6–24–1015 of 2006 be stayed pending the hearing and disposal of the defendant's appeal to the Court of Appeal;

(c) that such other reliefs may be granted or other conditions imposed as this honourable court deems fit; and

(d) that the costs of this application be costs in the cause.

[2] Basically, encl 26 sought for a stay of execution of my order dated 30 August 2006 in relation to encl 1 pending the hearing and disposal of the defendant's appeal to the Court of Appeal. I have since written a judgment in regard to encl 1 and it has not been reported as yet.

[3] Again, by way of encl 26, the defendant sought for a stay of all further proceedings pertaining to my order in relation to encl 1 and the defendant too sought for a stay of the Originating Summons No S 6–24–1015 of 2006.

[4] In my written judgment in regard to encl 1 ('the first judgment'), I focussed myself to only two enclosures, namely, encls 1and 2 without much ado.

WHAT ARE THE GROUNDS RELIED UPON BY THE DEFENDANT IN ORDER TO OBTAIN A STAY?

[5] The defendant relied on the following grounds in order to seek a stay:

(a) there are special circumstances for the application in encl 26 in that matters have occurred and/or new evidence emerged since the order of this court in regard to encl 1 which would render it inequitable and unjust that the said order should be carried into effect;

(b) the plaintiff in the course of the proceedings for assessment of damages for the balance of the plaintiff's claim in Originating Summons No S 6–24–1015 of 2006 has for the first time disclosed two valuation reports which prove that the plaintiff as the purchaser of the property — a pre-war double storey shophouse at No 47, Jalan Tuanku Abdul Rahman, Kuala Lumpur, had renovated and upgraded the old pre-war building and wrong fully claimed expenses for the same from the defendant as the vendor;

(c) the plaintiff in its Originating Summons No S 6–24–1015 of 2006 and in its supporting affidavit (that would be enclosure two (2)) had failed to disclose a material p 24 comprising of PART 12 of the sale and purchase agreement which substantially negates the basis of the plaintiff's claim against the defendant and which would confer upon the defendant a valid and substantive defence against the plaintiff's claim;

(d) the plaintiff had failed to prove its claim for special damages and misled this court by stating that it had exhibited receipts when in fact it only disclosed invoices without receipts and without any other evidence of payment;

(e) there are merits in the defendant's appeal to the Court of Appeal; and

(f) in all the circumstances, the defendant invokes the inherent powers of this court to make the necessary orders to prevent injustice or to prevent an abuse of the process of the court by the plaintiff.

THE FACTUAL BACKGROUND

[6] I have set out the facts in the first judgment. A little repetition would do some good. Now, the plaintiff as the purchaser and the defendant as the vendor entered into a sale and purchase agreement dated 22 March 2002 in respect of the property. The plaintiff paid the full purchase price of RM4,995,000 on 15 December 2002. The plaintiff claimed that when vacant possession of the property was delivered by the defendant on 1.5.2003 its condition was not the same as on the date of execution of the sale and purchase agreement.

[7] The plaintiff in encl 1 claimed for the sum of RM394,000 as special damages in order to carry out repair works to re-instate the property. The plaintiff also claimed for general damages to be assessed for loss of rentals for three and a half months which was the duration for the completion of the repair works.

[8] I granted the declarations sought as seen in the first judgment with an order that special damages of RM394,000 to be paid by the defendant to the plaintiff with interest at 8% per annum and costs. The balance of the plaintiff's claim in encl 1 was fixed for assessment of damages before the learned Senior Assistant Registrar and the same is pending and it is part-heard.

[9] Of pertinence is this new factor. That the plaintiff has also filed a petition to wind up the defendant in Companies (Winding Up) Petition No D7–28–769 of 2006 on the basis of my order pertaining to encl 1 and the same is now fixed for hearing on 16 February 2007. That winding-up petition has since been postponed on a number of occasions because of the continuing oral submissions of encl 26 before me. It has been an interesting exercise. Counsel on both sides have done well.

DEFENDANT'S APPEAL TO THE COURT OF APPEAL

[10] In the meantime, the defendant has filed a notice of appeal against my decision in allowing encl 1. It is still pending before the Court of Appeal. An appeal does not operate as a stay of execution (see *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257 (FC); *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49 (CA); *Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v Raja Zainal Abidin bin Raja Hussin & Anor* [1995] 3 MLJ 224; and *MBF Property Services Sdn Bhd v Madihill Development Sdn Bhd (No 3)* [1998] 5 CLJ 461).

SPECIAL CIRCUMSTANCES

[11] It was argued that the special circumstances to warrant a stay of execution of my order pertaining to encl 1 have surfaced. New evidence has emerged and that

would render it inequitable and unjust that my order in the first judgment should be carried into effect. It was pointed out that during the hearing of the assessment of damages before the learned senior assistant registrar on 29 November 2006, the plaintiff disclosed and introduced two new exhibits, namely:

(a) a report and valuation dated 2 May 2003 by Messrs Dass Mohamad Chartwell, Brooke Hillier Parker Sdn Bhd as seen in exh 'MK-3' of encl 25 ('the first report'); and

(b) a report and valuation dated 25 October 2004 by Messrs PPC International Sdn Bhd as reflected in exh 'MK-4' of encl 25 ('the second report').

[12] Now, both the abovementioned reports and valuations are in respect of the subject property and both the reports stated that it was the plaintiff's financier and/or the plaintiff who had commissioned the reports to be prepared.

[13] In the first report, the property is described as 'an intermediate pre-war double storey shop constructed with a tiled roof over load bearing plastered brick walls. The concrete ground floor is finished in plain cement rendering while the first floor consists of timber boards supported on timber joists.'

[14] The second report describes the property as being 'renovated' as follows (the relevant parts):

7.0 DESCRIPTION

The subject property comprises a renovated double-storey intermediate pre-war shophouse bearing postal address No:47, Jalan Tuanku Abdul Rahman, 50100 Kuala Lumpur.

7.2 The Building

The building is generally constructed of concrete floor on the ground floor and timber floor board on the first floor, reinforced concrete framework infilled with load-bearing brickwalls and with a timber roof trusses covered with interlocking tiles.

Brief details of the accommodation and finishes of the building are as follows:

ACCOMMODATION	FINISHES
Ground Floor	
Terrace	Floor — Homogeneous tiles. Ceiling — Cement plaster
Shop lots	Floor — Homogeneous tiles. Walls — Cement plaster/Cardboard Ceiling — Acoustic gypsum board
First Floor	
Shop Area	Floor — Carpeted Walls — Cement plaster Ceiling-Acoustic gypsum board
Office (2 Nos.)	Floor — Carpeted Walls — Cement plaster Ceiling — Acoustic gypsum board
Bath/W.C.	Floor — Ceramic tiles. Walls — Full height glazed tiles. Ceiling — Acoustic gypsum board

The main and rear entrances on the ground floor are of m.s. roller shutters whilst the windows are of aluminium frame glazed casements.

At the time of inspection, we noted that the ground floor has been converted to operate as a shopping arcade and has been partitioned to accommodate 22 shoplots with standard size of 7 feet by 10 feet. The carpeted/ceramic tiled floorings and acoustic gypsum boards ceiling are improvements from the original finishes.

The gross floor area of the building is about 438.50 square metres (4,720 square feet) inclusive of the ancillary floor area of about 14.86 square metres (260 square feet).

The building was observed to be in a good state of decorative repair."

[15] In the first report, the indemnity value of the property for fire insurance purpose is RM100,000 while in the second report it is stated that the re-instatement cost for insurance after renovation is listed at RM360,000.

[16] The learned counsel for the defendant took advantage of both the reports and argued strenuously in favour of the defendant. In the context of encl 1, it was argued that the plaintiff's claim for special damages for the sum of RM394,000 for the purported 'repair works' to 'reinstate' the property to its original condition as at the date of execution of the sale and purchase agreement dated 22 March 2002 is untenable and, in fact, a false claim and constitutes an unjust enrichment at the defendant's expense. It was further submitted that if the plaintiff had disclosed to this court, as it was bound to do so, in regard to both the reports, this court would not have granted the plaintiff the special damages as claimed by the plaintiff.

WHETHER THE DEFENDANT IS ENTITLED TO RELY ON BOTH THE REPORTS IN ORDER TO SUPPORT ITS APPLICATION TO STAY THE EXECUTION OF THE ORDER OF THIS COURT IN REGARD TO ENCL 1?

[17] I would answer this question in the positive. Both the reports may be regarded as fresh evidence that was not introduced when the plaintiff advanced its application in encl 1. Writing a separate judgment in the case of *Ladd v Marshall* [1954] 3 All ER 745, Denning LJ laid down the law for the reception of fresh evidence at p 748 of the report. There Denning LJ aptly said:

> It is very rare that application is made to this court for a new trial on the ground that a witness has told a lie. The principles to be applied are the same as those always applied when fresh evidence is sought to be introduced. In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

Now, in regard to the first condition, it must be pointed out that both the reports were the plaintiff's documents and they had been commissioned by the plaintiff's financier and/or by the plaintiff and they were, at all material times, in the possession of the plaintiff. It was the plaintiff who for the very first time disclosed both the reports during the hearing of the assessment of damages before the learned senior assistant registrar on 29 November 2006 and that was after I had allowed encl 1. In respect to the second condition, it was submitted that the fresh evidence was of

crucial importance. It was relevant and it would have an important influence in regard to the outcome of the case because it was the crux of the plaintiff's case that for special damages the plaintiff had incurred an expense of RM394,000 in order to 'carry out repair works to re-instate the 22 units of arcade shop lots on the ground floor, to rebuild half of the first floor and to rebuild the missing half of the roofing in the said property. The plaintiff had to pay the contractor the sum of RM394,000 for the repair works' (see para 11 of the plaintiff's supporting affidavit in encl 2). But, alas, both the reports showed that the plaintiff did renovation and upgrading works and not merely repair works as alleged in order to re-instate the property to its original condition as at the date of the sale and purchase agreement. It was submitted that the plaintiff's claim for RM394,000 would therefore be irregular and constitute an unjust enrichment at the defendant's expense. In regard to the third condition, it was submitted that the fresh evidence was credible because they were written documents prepared by professionals and tendered in court by the plaintiff itself in support of its claim for an assessment of damages.

[18] Both the reports make for an interesting evening reading material. The description of the renovation works as set out in the second report corresponds with some of the invoices tendered by the plaintiff in the plaintiff's supporting affidavit in encl 2. This fortifies the submission of the defendant that the plaintiff, in fact, did renovation and upgrading works.

[19] The following are examples of the renovation and upgrading works performed by the plaintiff's contractors:

(i) invoice no 0259 dated 15 May 2003 (at p 47 of encl 2) for ground floor shows, inter alia, that:

(a) floor, re-level for 2,200 sq.ft
supply floor tiles and lay on … RM26,400.00

(b) to supply and install hang ceiling
for 2,200 sq.ft … RM8,500

(c) electricity connections including
DB board 60 ways 3 phases … RM16,120

(d) wall, re-touch up and re-plaster
with cement … RM8,000

(e) re-piping from water meter to
shower room … RM6,000

(ii) invoice no 0267 dated 30 May 2003 (at p 48 of encl 2) for ground floor shows, inter alia, that:

(a) air-curtain for front and back
entrances, 10 units … RM15,600.00

(iii) invoice no 0270 dated 14 June 2003 (at p 51 of encl 2) for ground floor shows, inter alia, that:

(a) air-conditioned supply and installation, 5 units … RM15,600

(iv) invoice no 0312 dated 12 July 2003 (at p 49 of encl 2) for first floor shows, inter alia, that:

(a) floor tiling 2,200 sq ft supply tiles and lay on … RM25,000

(b) hang ceiling 2,200 sq ft … RM8,500

(c) electricity connections … RM8,600

(d) painting (ground floor and first floor) … RM30,000

(v) invoice no 0274 dated 28 June 2003 (at p 50 of encl 2) for first floor shows:

(a) floor slabs 2,200 sq ft with concrete … RM 88,000

THE EFFECT OF THE FRESH EVIDENCE

[20] It was the stand of the defendant that the fresh evidence as alluded to above constituted special circumstances that would compel this court to grant the stay as sought for by the defendant in encl 26. Was the defendant right in holding onto this view? I would, with respect, answer this question in the positive.

[21] In *Kerajaan Malaysia v Jasanusa Sdn Bhd* [1995] 2 MLJ 105 the then Supreme Court approved the definition of special circumstances advanced by Raja Azlan Shah J (as His Majesty then was) and this was what the Supreme Court said (see p 111 of the report):

> An attempt was made to define special circumstances by Raja Azlan Shah J (as His Majesty then was) in the case of *Leong Poh Shee v Ng Kat Chong* [1966] 1 MLJ 86, viz:
>
> > Special circumstances, as the phrase implies, must be special under the circumstances as distinguished from ordinary circumstances. It must be something exceptional in character, something that exceeds or excels in some way that which is usual or common.
>
> The definition only serves to emphasize the fact that there are myriad circumstances that could constitute special circumstances with each case depending on its own facts. I am of the opinion that the list of factors constituting special circumstances is infinite and could grow with time. Any attempt to limit the list or close a category would be to impose a fetter on the exercise of the discretion of the court whether to grant or stay an execution; making the discretion less of a discretion. This is surely not what discretion is all about. As long as one does not stray beyond the perimeter set by the judicial principles, the discretion can be exercised.

And the Federal Court in *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257 at p 266 also cited with approval the above passages in its judgment.

[22] In *Jaya Harta Realty Sdn Bhd v Koperasi Kemajuan Pekerja-Pekerja Ladang Bhd* [2000] 6 MLJ 493 at p 499, the High Court had occasion to say something about 'special circumstances':

> Thus, 'special circumstances' does not mean very special or exceptional or peculiar circumstances but is a term to denote a combination of certain determining factors that are demonstrated by affidavit evidence to persuade the court that it is a just and appropriate case to grant a stay of execution in the circumstances.

[23] In all the circumstances, it would be a correct assertion to make and I so make to this effect: that the fresh evidence in respect of the two reports with a combination of the 'unjust enrichment' factor in favour of the plaintiff would certainly constitute 'special circumstances' as defined by the Superior Courts. According to Lord Haldane LC in *Royal Bank of Canada v Rex* [1913] AC 283, p 296:

> It is a well established principle of English common law that when money had been received by one person which in justice and equity belongs to another, under circumstances which render the receipt of it a receipt by the defendant to the use of the plaintiff, the latter may recover as money had and received to his use.

And Lord Wright in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, in similar vein, although not in similar words, had this to say (see p 61 of the report):

> It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in
>
> contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution.

[24] Of pertinence, and it is certainly in favour of the defendant, would be O 45 r 11 of the Rules of the High Court 1980 ('the RHC'). That rule states as follows:

> Without prejudice to Order 27, rule 1, a party against whom a judgment has been given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the Court may by order grant such relief, and on such terms, as it thinks fit.

Both the reports surfaced after I gave my decision in favour of the plaintiff in regard to encl 1 as reflected in the first judgment. If would therefore be appropriate to invoke O 45 r 11 of the RHC in favour of the defendant. This was my judgment and I so hold accordingly.

[25] There were other factors constituting special circumstances that can be cited and how pertinent these factors may be would vary according to the circumstances of each particular case (using the words employed by Abdul Hamid Omar J (as his Lordship then was) in *Mohamed Mustafa v Kandasami (No 2)* [1979] 2 MLJ 126).

The category of 'special circumstances' cannot be closed and it will continue to grow as seen in this judgment. I will now demonstrate it accordingly.

INVOICES WITHOUT RECEIPTS

[26] The plaintiff's affidavit in support in encl 2 asserted at para 11 to the following effect: that 'the contractor's invoice and receipt for the sum of RM394,000 which are annexed hereto and marked as exh 'RKB-3'.' The Malay language version of the same paragraph of the same affidavit was worded in this way:

> Sekarang dilampirkan dan ditunjukkan kepada saya adalah invois-invois dan resit-resit untuk jumlah RM394,000 yang ditandakan sebagai eksibit 'RKB-3'.

A perusal of exh 'RKB-3'of encl 2 would indicate that only the invoices were exhibited. No receipts were exhibited at all. In fact, there was no evidence that the plaintiff had made any payment. It can therefore be concluded that the plaintiff's averments that payments were made based on the receipts were both misleading and deceptive.

THE FAILURE ON THE PART OF THE PLAINTIFF TO DISCLOSE THE COMPLETE SET OF THE SALE AND PURCHASE AGREEMENT EVIDENCING THE PURCHASE OF THE PROPERTY

[27] The plaintiff did not disclose and/or omitted to disclose a crucial page in the sale and purchase agreement. That would be p 24 and in that page a material clause PART 12 relating to the date of delivery of possession is set out. A perusal of PART 12 read together with cll 6 and 10 of the sale and purchase agreement would reveal that the date of delivery of possession of the property was on 15 December 2002. This is a crucial date simply because while the date of delivery of possession was on 15 December 2002, the date of delivery of vacant possession was on 1 May 2003.

[28] I will now reproduce PART 12, CLAUSES 6 and 10 of the sale and purchase agreement together with the Second Schedule thereto:

(i) Part 12 DELIVERY OF POSSESSION

> Possession subject to the current tenancy shall be delivered on 1.5.2002 or upon payment of the balance purchase price to the vendor, which ever is the later. It must be emphasised that the plaintiff averred that the full purchase price was paid on 15.12.2002.

(ii) Clause 6 DELIVERY OF POSSESSION

> Possession of the said property shall be delivered by the vendor(s) to the purchaser(s) within the time as specified in Part 12 of the First Schedule.

(iii) Clause 10 INSPECTION OF PROPERTY

> The purchaser(s) hereby confirms and declares that they have inspected the said property prior to the execution of this agreement and the purchaser(s) are satisfied with the condition state nature and character of the said property and the parties agree that the said property shall substantially be in and of the same condition state nature and character (fair wear and tear excepted) at the date of delivery of possession of the said property to the purchaser(s).

(iv) THE SECOND SCHEDULE, Paragraph 2

> In the event the vendor shall fail to cause the present tenant to deliver vacant possession pursuant to clause 5(iii) of the tenancy agreement on or about 1st May 2003, then the vendor shall pay agreed liquidated damages amounting to RM26,000 per month from 1st May 2003 until actual physical vacant possession is delivered by the current tenant to the purchaser.

(v) THE SECOND SCHEDULE, Paragraph 1

> It is expressly agreed by the vendor that pending the delivery by the tenant of vacant possession the purchaser shall be entitled to collect monthly rental of RM26,000.00 payable by the tenant effective from 1.5.2002 or payment of the balance of the purchase price which ever is the later … '.

[29] And it would be significant to note that the plaintiff averred that vacant possession was delivered on 1 May 2003.

[30] Now, pursuant to clause 10 of the sale and purchase agreement, the defendant would only be liable if on the date of delivery of possession, that is, on 15 December 2002, the property was not in the same condition as on the date of execution of the sale and purchase agreement on 22 March 2002. In fact, there was no such averment or allegation by the plaintiff and therefore liability cannot be attached to the defendant. The plaintiff's allegations in paras 9 and 10 of the affidavit in support in encl 2 to the effect that when vacant possession was delivered on 1 May 2003, the property was not substantially in the same condition as on the date of the sale and purchase agreement was certainly irrelevant.

[31] It can readily be surmised that the combination of the determining factors as adumbrated above would, in the circumstances, make it just and appropriate to grant a stay of execution.

THE DEFENDANT'S DELAY IN FILING AN AFFIDAVIT IN REPLY TO THE ORIGINATING SUMMONS IN ENCL 1

[32] The defendant's delay in filing the affidavit in reply to the originating summons in encl 1 did not exculpate the plaintiff from proving its claim for damages as claimed. Section 101 of the Evidence Act 1950 enacts as follows:

BURDEN OF PROOF

101. (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

ILLUSTRATIONS

(a) A. desires a court to give judgment that B. shall be punished for a crime which A. says B. has committed.

A. must prove that B. has committed the crime.

(b) A. desires a court to give judgment that he is entitled to certain land in the possession of B. by reason of facts which he asserts and which B. denies to be true.

A. must prove the existence of those facts.

And in *Johore State Economic Development Corp v Queen Bee Sdn Bhd* [1995] 4 MLJ 371, I had occasion to comprehensively set out the principle that special damages must be specifically proved. At pp 378–379 of the report, this was what I said:

> Next, it was argued that the trial court in awarding RM15,250 for the airconditioning ducts misconstrued the principle that special damages must be specifically proved. It is correct to say that special damages belong to those class of damages that can be calculated and computed in monetary terms. The respondents under the law must not only specifically plead special damages as was rightly done but they need to go one step further to prove it. The respondents cannot simply write down the particulars and leave it to the trial court to decide. The respondents took a perilous course when they decided to throw the special damages for the trial court to adjudicate. The obvious reason which I can think of for special damages to be specially pleaded is to crystallize the issue and enable the combatants to prepare for trial. In so far as the trial before the trial court was concerned the appellants were well prepared and they certainly knew what to expect and indeed demonstrated their readiness right from the start (*Yeap Cheng Hock v Kajima Taisei Joint Venture* [1973] 1 MLJ 230 and *Guan Soon Tin Mining Co v Wong Fook Kum* [1969] 1 MLJ 99).
>
> In *Admiralty Commissioners v SS Susquehanna* [1926] AC 655 Viscount Dunedin stated the law and which is now trite as follows:
>
> > If there be any special damage which is attributable to the wrongful act, that special damage must be averred and proved and, if proved, will be awarded.
>
> The recent judgment of the Federal Court in *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15 (FC) demonstrates once again the need to prove damages to the hilt. In a well written judgment, Edgar Joseph Jr FCJ sets out the principles lucidly. His Lordship had this to say:
>
> > Firstly, that part of the judgment of the judge which provides that the vendor shall pay to the purchaser damages to be assessed for wrongful termination of the agreement with costs and that Tan Sri Khoo and the vendor shall pay to the purchaser damages to be assessed for breaches of the undertakings, even though affirmed on appeal, can in no way relieve the purchaser of satisfying the fundamental requirement of having to prove its loss (if any) arising from those breaches. To hold otherwise would amount to dispensing with proof of quantum altogether, and that cannot be the law. In so saying, we are reminded of the words of Lord Goddard in *Bonham-Carter v Hyde Park Hotel Ltd* 64 TLR 177, 178:

> … plaintiffs must understand that if they bring action for damages it is for them to prove their damage; it is not enough to write down the particulars, so to speak, throw at the head of the court, saying: 'This is what I have lost, I ask you to give me these damages.' They have to prove it.

This dictum was referred to and applied by our Court of Appeal in *John v Dharmaratnam* [1962] MLJ 187.

And, in *Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360, the court had occasion to say this (at p 367):

> It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right. Thus nominal damages may be awarded in all cases of breach of contract (see *Marzetti v William*). And, where damage is shown but its amount is not proved sufficiently or at all, the court will usually decree nominal damages. See, for example place *CityDixon v Deveridge* and *Twyman v Knowles*.

In *Malaysian Rubber Development Corp Bhd v Glove Sdn Bhd* [1994] 3 MLJ 569, at p 582E to F, Mohd Dzaiddin SCJ, speaking for the Supreme Court quoted, with approval, the above passage in the *Popular Industries* case.

Way back in 1960, in *Lee Sau Kong v Leow Cheng Chiang* [1961] MLJ 17 (CA), Thomson CJ relied upon the dictum of Lord Goddard in the case of *Bonham-Carter v Hyde Park Hotel, Ltd* (1948) 64 TLR 177 at p 178 and adopted a strict attitude towards the burden of proving special damages. This was how his Lordship tackled the problem:

> Then he claimed what he called special damages amounting to the sum of $4,888.92.
>
> Of this, $2,888.92 was said to be for 'travelling, board, subsistence and other' expenses incurred by him between May 1953, and March 1955, in connection with the agreement. There is not a scrap of evidence as to any connection between the expenditure of this sum and the appellant's repudiation of the agreement and in the absence of such evidence the respondent is not entitled to recover anything.

(See also *Segar Restu (M) Sdn Bhd v Wong Kai Chuan & Anor* [1994] 3 MJJ 530 [1994] 4 CLJ 757 and Zainal Abidin bin Sulaiman and 26 *Others v Hoya Holdings Sdn Bhd* [1993] 2 AMR 31

It is my considered view that damages are not meant to be punitive in nature but rather compensatory so as to put the respondents in the same or similar position, as far as possible, as the respondents would have been had the tenancy agreement not been mutually terminated. But the compensation would certainly not benefit the respondents financially or place them in a better financial position if the tenancy agreement had not been mutually terminated. However, it is important that the respondents here establish by evidence their losses and the trial court should not grant the respondents by way of damages in the absence of actual proof thereof.

[33] In *Mahindar Singh v Amanah Saham Pahang Bhd & Anor* [1984] 1 CLJ 181, VC George J, held that special damages in respect of the costs of repairs for a car did not constitute a 'debt or liquidated demand' but rather, it constituted 'damage' which had to be proved. At p 182 of the report, this was what his Lordship said:

> 14. Was the $28,814.04 claimed as Special Damages a liquidated demand?

15. A liquidated demand is in the nature of a debt, ie a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a 'debt or liquidated demand', but constitutes 'demand'.

16. The words 'debt or liquidated demand' do not extend to unliquidated damages, whether in tort or in contract, even though the amount of such damages be named at a definite figure (*Knight v Abbot* 10 QBD 11). The Supreme Court Practice 1979 Vol Para. 6/2/4A.

17. To my mind many of the items that made up the $28,814.04 call for investigations beyond mere calculation and accordingly are not debts or liquidated demands but damages.

[34] In *Ho Kok Thin & Anor v KMA Marketing Sdn Bhd* [2006] 7 MLJ 152, the landlord claimed damages against the sub-lessee on the ground that the sub-lessee had left the premises in an untenantable repair and condition. The court held that damages must be strictly proved.

[35] All the principles as alluded to above are of significance bearing in mind that the invoices relied upon by the plaintiff, on the face of it, referred to renovation and improvement and upgrading of materials over and above the repair and re-instatement works. To add insult to injury, there were no accompanying receipts. The improvement and upgrading works based on the invoices included, inter alia, new electrical wirings, DB board 60 ways 3 phase wirings, wall touch-up and re-plastering with cement, re-piping from water meter to shower room, air-curtain (front and back entrances) 10 units, wall painting (internal and external), outdoor weather seal, air-conditioners (5 units), ground floor 2,200 sq ft supply of floor tiles and lay on, first floor 2,200 sq ft with concrete and floor tiling, etc.

[36] Thus, in considering encl 26, the absence of an affidavit in reply by the defendant to challenge encl 1 and to rebut the affidavit in support in encl 2 would not and cannot dispense with the legal requirement of proving the damages by the plaintiff to the hilt. But, it must also be borne in mind, that in considering encl 1, all the averments in the affidavit in support in encl 2 stood alone, unrebutted and deemed to be admitted.

[37] Merits of the appeal or strong grounds for an appeal (to borrow the words of NH Chan J (as he then was) in *Che Wan Development Sdn Bhd v Co-operative Central Bank Bhd* [1989] 3 MLJ 40 at p 43) can never be construed nor accepted as special circumstances. Here, however, in considering the stay application in encl 26, the following germane observations must be highlighted:

(a) that the declarations sought by the plaintiff have no connection to the damages claimed and that the damages claimed did not flow from the declarations and the same can therefore be said to be embarrassing and it had no useful purpose to serve and, consequently, it ought to be dismissed (see *Kho Poh Teck v Digi Telecommunications Sdn Bhd* [2006] 6 MLJ 349);

(b) that the special damages of RM394,000 claimed by the plaintiff, in the circumstances, require further investigation beyond mere mathematical calculation and the same cannot be construed to be a debt or liquidated demand but constitutes 'damages' to be proved (see *Mahindar Singh v Amanah Saham Pahang Bhd & Anor*);

(c) that pursuant to s 74 of the Contracts Act 1950, damages allegedly suffered must be proved and it must also be proved to arise from the alleged breach of contract;

(d) in any event, the disclosure of mere invoices without receipts or any evidence of payment cannot constitute proof of payment; and

(e) as I said, the invoices disclosed improvement and up grading works.

[38] All these germance observations add mileage to the defendant's application in encl 26 for a stay. Incidentally, in *Hongkong Bank Malaysia Bhd v Wexcel Holdings Sdn Bhd & Ors* [2005] 2 MLJ 616, I had occasion to state the law pertaining to the stay application in that case. There I said (see p 620 of the report):

[12] The following principles governing the stay application may be stated in this way:

(1) that the appeal to the Court of Appeal does not of itself operate as a stay of execution;

(2) that it is entirely at the discretion of the court, to be exercised in accordance with the established principles, whether to allow or disallow the stay;

(3) that foremost in the mind of the court is the principle that the court should not deprive a successful litigant of the fruits of his victory pending an appeal unless there are special circumstances justifying the stay;

(4) would the defendants' appeal be rendered nugatory if the stay is refused?;

(5) that an order for the stay of proceedings is to be made sparingly and only in exceptional circumstances; and

(6) that if the stay is not granted, the defendants, even if they succeed in their appeal to the Court of Appeal, could not be restored to the same positions as they were in before the litigation sets in.

Factually speaking, in that case, the plaintiff had granted a banking facility on an overdraft facility amounting to RM740,000 and a loan facility amounting to RM1.4m to the first defendant. These facilities were guaranteed by the second and the third defendants. The plaintiff alleged a default by the defendants and successfully obtained a summary judgment against the defendants. The defendants filed an appeal to the judge in chambers and the appeal was dismissed with costs. Dissatisfied, the defendants filed a notice of appeal to the Court of Appeal. The appeal to the Court of Appeal was still pending and the defendants then filed an application for a stay of execution. I granted the stay as sought for by the defendants in that case and in so doing I had assessed the various factors including the fact that the defendants there had demonstrated that 'the probabilities are in favour of the appeal being allowed' and that a winding up notice 'would certainly cripple the business of the first defendant notwithstanding the fact that the first defendant has a good defence and an appeal on the merits.' In that case, I too had said that the plaintiff there had 'failed to show or prove that it will be prejudiced if the defendants' application for a stay would be allowed' (see p 624 of the report).

[39] Here, the statutory accounts of the defendant filed with the Companies Commission of Malaysia shows that even if the defendant's appeal is unsuccessful, the plaintiff would still be able to taste the fruits of its victory. Here too the plaintiff has failed to show or prove that it will be prejudiced if the defendant's appeal for a stay is allowed.

RES JUDICATA

[40] The learned counsel for the plaintiff submitted that the defendant was ventilating issues that run counter to the doctrine of res judicata and to allow the defendant to proceed along those lines would be wrongful, unlawful and an abuse of the process of the court. What is res judicata? The answer can be found in the judgment of Sharma J, (as he then was) in the case of *Government of Malaysia v Dato Chong Kok Lim* [1973] 2 MLJ 74. At p 76 of the report, his Lordship Sharma J (as he then was) aptly said:

> In *Satyadhyan Ghosel & Ors v Sint Deorajin Dobi and another* AIR 1960 SC 941, the statement of the law on the subject is given thus:
>
> > The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is *judicata*, it shall be not adjudged again. Primarily it applies as between past litigation and future litigation. When a matter — whether on a question of fact or a question of law — has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in s 11 of the Code of Civil Procedure; but even where s 11 does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct.
> >
> > The principle of res judicata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings.
>
> A decision given by a court at one stage on a particular matter or issue is binding on it at a later stage in the same suit or in a subsequent suit. *(See Peareth v Marriott* (1883) 22 Ch D 182, *Hook v Administrator-General of Bengal & Ors LR* 48 IA 187 and *Re Trusts of the Will of Tan Tye (Deceased) Yap Liang Neo v Tan Yew Ghee and Another* (1936) MLJ 141 at pp 147–151). Parties cannot raise a second time in the same suit an issue that has already been determined either expressly or by necessary implication. *(See Louis Dreyfus v Aruna Chalayya LR* 58 IA 381).

This very passage was favourably quoted by Gopal Sri Ram JCA in *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57, at pp 65–66.

[41] Basically, the doctrine of res judicata is not a technical doctrine. It is a simple doctrine and it is applicable to all the courts in the country in that there must be an end to litigation (*Re May* (1885) 28 ChD 516 at p 518 (CA); *Re Graydon, ex p Official Receiver* (1896) 1QB 417; *Philips v Bury* (1696) Holt KB 715; *Badar Bee v*

Habib Merican Noordin (1909) AC 615 (PC); *Hoystead v Taxation Comr* (1926) AC 155 at p 165 (PC); *R v Middlesex Justices, ex p Bond* (1933) 2 KB 1 (CA); *Eastmure v Laws* (1839) 5 Bing NC 444; *Danks v Farley* (1853) 1 WR 291; *Webster v Armstrong* (1885) 54 LJQB 236; *Mac dougall v Knight* (1890) 25 QBD 1 (CA); and *Green v Weatherill* (1929) 2 Ch 213) provided that the whole legal rights and obligations of the parties to the action are concluded by the earlier judgment which judgment may have decided questions of law as well as findings on a set of facts *(Collier v Walters* (1873) LR 17 Eq 252; and *Marriot v Hampton* (1797) 7 Term Rep 269).

[42] The principle of res judicata will not apply in a situation where the party is relying on a piece of fresh evidence in the form of a DNA genetic finger-printing evidence that was not available at the time of the earlier proceeding (see *Hager v Osborne* (1992) Fam 94; [1992] 2 All ER 494). It will also not apply in an affiliation proceeding as envisaged in the case of *R v Sunderland Justices, ex p Hodgkinson* [1945] KB 502; [1945] 2 All ER 175, DC.

[43] In a libel claim where judgment is given in favour of the defendant in regard to certain parts of a publication, that judgment would constitute a defence of res judicata to a second claim against the same defendant even though it relates to other parts of the same publication because the subject matter of both claims are the same (*Macdougall v Knight*). Here, before me, the plaintiff's claim was not grounded on libel. Again, where judgment is obtained against a lady defendant for payment of a sum of money misapplied by her as a trustee, that judgment would estop the plaintiff from obtaining in another action on practically the same facts in a different form for payment into court of the money proved to have reached the hands of the lady defendant as a trustee (*Green v Weatherill*).

[44] I have read quite a number of the old cases and I found that the judges in those cases used varying terms to describe the same thing. Thus, terms like 'res judicata', 'issue estoppel', 'cause of action estoppel', 'estoppel by record', and 'collateral estoppel' have often been used. The modern tendency, according to some text book writers, is to use the phrase 'res judicata' in a comprehensive manner so as to cover all those terms of estoppel used by the judges in the old cases. And may I add that the doctrine of res judicata will remain an area of interest to the academicians in many years to come. The doctrine will always be invoked where the cause of action is the same (see *Hills v Co-operative Wholesale Society Ltd* [1940] 2 KB 435; [1940] 3 All ER 233 (CA)) and the cause of action has been determined on the merits (*DSV Silo-und Verwaltungsgesellschaft mbtt v Owners of the Sennar, The Sennar* [1985] 2 All ER 104 at p 106, [1985] 1 WLR 490 at p 494 (HL); *Charm Maritime Inc v Minas Xenophon Kyriakou and David John Mathias* [1987] 1 Lloyd's Rep 433 (CA); *Livesey v Harding* (1855) 21 Beav 227; *AG v Rochester Corpn* (1833) 6 Sim 273; *Glasgow and South-Western Rly Co v Boyd and Forrest* (1918) SC (HL) 14; *Long v Gowlett* (1923) 2 Ch 177; *Alfred Rowntree & Sons Ltd v Frederick Allen & Sons (Poplar) Ltd* (1935) 41 Com Cas 90; and *Matuszczyk v National Coal Board* (1955) SLT 101).

[45] Here, on the available evidence, in adjudicating the stay application the doctrine of res judicata has no application. I even venture to say that the doctrine

A does not apply to any application for a stay. Public policy considerations dictate that the doctrine do not apply because it is a separate application pending the appeal to the Court of Appeal. It would be perverse to argue that the stay application has been decided by me in the first judgment. Here, if the stay was not granted, the appeal, if successful, would be rendered nugatory. It must be emphasised that the defendant's contention of the presence of the fresh evidence in the form of both the reports cannot be ignored. This fresh evidence constitutes special circumstances. And the nature of the special circumstances may be conveniently encapsulated in these salient words: it is the gross abuse of process of non-disclosure of both the reports when this court heard and adjudicated the originating summons in encl 1 as seen in the first judgment bearing in mind that both the reports would prove that the plaintiff's claim for special damages may constitute an unjust enrichment for the benefit of the plaintiff. It is now clear beyond per adventure that the invoices do not represent repair works to reinstate the property as at the date of execution of the sale and purchase agreement but in fact it is renovation works which improved and upgraded the property. The timber floor board on the first floor has been upgraded to concrete. If that is not an upgrading, I do not know what is. It is certainly within the inherent jurisdiction of this court to invoke O 94 r 4 of the RHC and 'make such order as may be necessary to prevent injustice or to prevent an abuse of the process of the court'. A judicial discretion was exercised by me in granting the stay of execution in the case of *Hongkong Bank Malaysia Bhd v Wexcel Holdings Sdn Bhd & Ors* and I am inclined to do so in this case.

THE WINDING UP

[46] The winding up petition was filed by the plaintiff on 27 October 2006 before the fresh evidence was disclosed by the plaintiff for the first time on 29 November 2006. Had the fresh evidence been introduced at the hearing of encl 1, there may not be a winding up petition filed by the plaintiff against the defendant. Be that as it may, a passage appearing in the judgment of Abdul Aziz Mohamad JCA (now FCJ) in *Pontian United Theatre Sdn Bhd v Southern Finance Bhd (formerly known as United Merchant Finance Bhd)* [2006] 2 MLJ 602 (CA), at p 608 merits reproduction. There his Lordship had this to say:

> [3] I do not agree. A demand on a company under s 218(2)(a) may be made by 'a creditor … to whom the company is indebted in a sum exceeding five hundred ringgit then due'. A judgment for a sum establishes the debt, which then becomes due to the person to whom it is owed, who then becomes the creditor. The sum remains due even though the debtor's appeal against the judgment is pending, because an appeal does not operate as a stay of execution. The sum must be paid unless execution of the judgment has been stayed, in which event it is no longer due. In this case there was no stay of execution of the summary judgment.

Thus, once a stay is granted, the winding-up proceeding will come to a halt. The defendant here is desirous of obtaining a stay.

THE DELAY

[47] The defendant filed the application for a stay in encl 26 on 11 January 2007 after the fresh evidence came to light. The fresh evidence was only introduced by the

plaintiff on 29 November 2006. There was a delay of about six weeks when the defendant filed encl 26. To me, that would not constitute an unreasonable and inordinate delay.

INHERENT JURISDICTION OF THE COURT

[48] The defendant relied upon the inherent jurisdiction of this court in order to advance its application in encl 26. This can be seen in ground (f) of encl 26. In this context it would be ideal to refer to the case of *Credit Lyonnais v SK Global Hong Kong Limited* (2003) MLB (HK) 28311 which dealt with two important principles of law, namely:

(a) the court's inherent jurisdiction in suitable cases to make orders staying execution; and

Order 45 rule 11 of the RHC.

Writing a separate judgment, this was what Hon Ma CJHC had to say:

> 2. I have no doubt that the court retains an inherent jurisdiction, in suitable cases, to make orders staying execution quite apart from those situations expressly permitted under the Rules of the High Court (namely, RHC O 45 r 11, O 47 r 1 and O 59 r 13). By the term 'suitable cases' are meant those situations in which the inherent jurisdiction of the court is required to be exercised so as to avoid injustice, prevent abuse, preserve the dignity of the court or to facilitate the administration of justice. This is, of course, the rationale for the existence of the jurisdiction in the first place. An inherent jurisdiction exists even in respect of matters regulated by statute or rules of court (see *Halsbury's Laws of England* Vol 37 (4th edition) at paragraph 14), although I accept the point made by Rogers VP that the inherent jurisdiction must not expressly conflict with Rules of Court.

Continuing further, his Lordship Hon Ma CJHC said:

> 5. Exceptionally, however, the judgment creditor may be prevented from levying execution. I emphasize the exceptional nature of this, for the court is in these circumstances being asked to deprive a successful party of the fruits of the judgment he has obtained. The exercise by the court of its jurisdiction to stay execution under O 45 r 11, O 47 r 1 and O 59 r 13 demonstrates this. Thus, a stay of execution may be granted where:
>
> (1) New evidence emerges after the relevant judgment, showing that it was not valid: — see *Tam Ho Man v Wong Kwok Tai*, unreported, 20 October 1986 [1986] HKLY 705. This case dealt with the court's jurisdiction under RHC O 45, r 11.

And at para 15 of the report, Hon Rogers VP aptly said:

> 15. Order 45 Rule 11 empowers a court to order a stay of execution of a judgment or order on the grounds of matters which have occurred since the date of the judgment or order. In the case of *London Permanent Benefit Building Society v De Baer* [1969] 1 Ch 321 Plowman J considered that the matters referred to in the rule were those which would have prevented the order being made, or which would have led to a stay of execution if they had already occurred at the date of the order. It would appear from a brief note of the decision of Hunter J in *Tam Ho Man v Wong Kwok Tai* that similar reasoning was applied in his decision, a note of which appears at (1986) HKLY 705. Mr Reyes SC, who appeared on behalf of the defendant, referred to those judgments and submitted

A that although they were judgments at first instance they appear to have been followed consistently and accepted as the proper interpretation of Order 45 Rule 11 and did not seek to argue against them. He thus put his case upon the court's inherent power to regulate its own proceedings.

At para 28 of the report, Hon Cheung JA had this to say:

B 28. Under Order 45 Rule 11, a stay may be ordered by reason of 'matters which have occurred since the date of judgment'. This has been interpreted in *Tam Ho Man v Wong Kwok Tai* [1986] HKLY 705 as referring to 'matters which went to the validity of the judgment and which, if established before the court, might justify the court in saying that this was not a judgment which on the material now placed before it, it would allow to be exercised'.

C

Continuing at paras 35–36 of the report, Hon Cheung JA succinctly said:

35. Sir Jack I.H. Jacob, the former Senior Master of the Supreme Court of England, had in an article entitled *The Inherent Jurisdiction of the Court*(Current Legal Problems 1970) stated this:

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The inherent jurisdiction of the court may be exercised in any given case, notwithstanding that there are Rules of Court governing the circumstances of such case. The powers conferred by Rules of Court are, generally speaking, additional to, and not in substitution of, powers arising out of the inherent jurisdiction of the court. The two heads of powers are generally cumulative, and not mutually exclusive,

E so that in any given case, the court is able to proceed under either or both heads of jurisdiction.

36. In my view this statement is obviously correct because the juridical basis of this jurisdiction is the authority of the judiciary to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and

F effective manner. In order to discharge these functions the inherent jurisdiction has to be exercised cumulatively with the powers under the Rules.

[49] I gratefully adopt the speeches of the judges in *Credit Lyonnais v SK Global Hong Kong Limited* in adjudicating encl 26.

G

[50] The majority decision of the Federal Court in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 vigorously applied the inherent jurisdiction of the court in deciding the case. Even the Supreme Court in *Kerajaan Malaysia v Jasanusa Sdn Bhd* [1995] 2 MLJ 105 at p 117; and in *Chong Woo*

H *Yit v Government of Malaysia* [1989] 1 MLJ 473 applied the inherent powers of the court in granting a stay.

[51] With respect, the case of *Mc Phail v Persons, Names Unknown* [1973] 1 Ch 447 that was relied upon by the learned counsel for the plaintiff is totally irrelevant

I and cannot be considered in adjudicating encl 26. In that case, the English Court of Appeal held that where squatters have unlawfully occupied houses and the owners have obtained orders of possession, the court had no jurisdiction to suspend the

orders for possession. Factually speaking, the facts in Mc Phail are poles apart from the facts of the present case. And the case of *Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217, (SC), is also irrelevant in the context of enclosure 26 because that case focussed itself, inter alia, on the issue of contempt of court. It is appropriate to reproduce the speech of Hunter J., in the case of *Tam Ho Man v Wong Kwok Tai HCA* 004 736/1985and this was what his Lordship said:

> The jurisdiction is said to arise and only said to arise under O 45 r 11. O 45 r 11 allows a party to apply for a stay of execution of a judgment or order 'on the ground of matters which have occurred since the date of the judgment or order'. The matter relied upon, and said to have occurred since the judgment or order is in fact the issue of the bankruptcy notice. Now the footnote in the White Book tells us that this particular rule was taken from the former O 42 r 27 which have put an end to proceedings by audita querela. The scope of the rule is, I believe, indicated by that footnote and the form of the proceedings which were abolished by the predecessor to this rule. Mr Ching who appears for the applicant, has been kind enough to produce to me Volume 1 of Bouvier's Law Dictionary published in 1897, which has a very interesting note about audita querela. It is described as '*a form of action which lies for a defendant to recall or prevent an execution on account of some matter occurring after judgment amounting to a discharge and which could not have been and cannot be taken advantage of otherwise*'. By way of examples given of where this form of action is open; '*it lies where an execution against A has been taken out on a judgment acknowledged by B without authority in A's name; generally, for any matters which work a discharge occurring after judgment entered, and for matters occurring before judgment which the defendant could not plead through want of notice or through collusion or fault of the plaintiff*'.
>
> All the examples given are matters which go to question the validity of that judgment as against that defendant. They are very far removed from matters which go to the enforcement of that judgment e.g. the giving of a notice in bankruptcy. Those passages in Bouvier certainly have served to confirm my initial impression on reading the rule. '*On the ground of matters which have occurred since the date*' refers to matters which go to the validity of the judgment, and which if established before the court, might justify the court in saying that, this is not a judgment which on the material now placed before it, it will allow to be executed upon.
>
> In these circumstances, I have no doubt that I have no jurisdiction to make the order sought under 0.45, r 11, because this application simply does not come within its term. I have some sympathy with this defendant who may be said to be faced with extinction arising from a judgment debt which he now is unable to meet. But he must deal with that in a different way to this. This application has to be dismissed with costs. (Emphasis added.)

[52] It must be borne in mind that both the reports have been tendered by the plaintiff before the learned Senior Assistant Registrar in the course of the hearing for the assessment of damages. These two reports were exhibited in the affidavit in encl 25 supporting the application for a stay in encl 26 and they constituted special circumstances that compelled this court to grant the stay of execution of the order dated 30 August 2006 pending the appeal to the Court of Appeal. As fresh evidence, both these two reports constituted 'matters which went to the validity of the judgment' dated 30 August 2006 and which would 'justify the court in saying that this was not a judgment which on the material now placed before it, it would allow

to be exercised' (borrowing the words of Hon Cheung JA in *Credit Lyonnais v SK Global Hong Kong Limited*.

CONCLUSION

[53] For the reasons as adumbrated above, I gave an order in terms of encl 26 prayers (a), (b) and (d). In short, I granted the stay as sought for by the defendant.

Order accordingly.

Reported by Sally Kee